

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

MITSUBISHI HITACHI POWER SYSTEMS
AMERICAS, INC.

and

Case No. 12-CA-188952

MOHAMED SHAHAT, an Individual

**RESPONDENT EMPLOYER'S EXCEPTIONS TO
ADMINISTRATIVE LAW JUDGE'S DECISION**

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board, Respondent Mitsubishi Hitachi Power Systems Americas, Inc. ("Employer") excepts to the Decision ("Decision") of the Administrative Law Judge ("ALJ") issued on February 1, 2018. In the Decision, the ALJ made various findings of fact before ultimately concluding that Employer discharged Mohamed Shahat ("Shahat") in violation of Section 8(a)(1) of the National Labor Relations Act ("Act") and ordering it to cease and desist its wrongful acts and to take affirmative action to effectuate the policies of Act. Employer believes that, in the Decision, the ALJ erred as to various findings of fact and conclusions of law:

1. The ALJ erred as a matter of law by concluding that Shahat had engaged in activity that was "concerted" within the meaning of the Act and Board precedent. Dec. 35 at 35; Tr. 71-72, 118-119, 116-123, 349; Resp. Ex. 21, 33.¹

2. The ALJ erred as a matter of law by concluding that Shahat's discharge by Employer was motivated by Shahat's protected concerted activity and that the discharge thereby

¹ These exceptions cite those portions of the Decision to which exception is taken and those portions of the record on which Employer relies. The Decision page and lines are cited "Dec. [page] at [line]", transcript pages are cited "Tr. __," and Respondent's exhibits are cited "Resp. Ex. __."

violated Section 8(a)(1). Dec. 35 at 35; Tr. 29-31, 36-39, 260-262, 267-286, 387-390, 393, 431-432, 435-436, 441-443, 457-459, 464, 467; Resp. Ex. 8-14, 16-17.

3. The ALJ erred as a matter of law by finding and concluding that Employer would not have discharged Shahat irrespective of any protected concerted activity, that is, the ALJ erred by failing to find and conclude that Employer had established a *Wright Line* defense. Dec. 35 at 13-31; Tr. 36-39, 260-262, 267-280, 395, 431-432, 471; Resp. Ex. 8-14, 16-17.

4. The ALJ erred by finding that General Counsel had met his initial *Wright Line* burden of showing Shahat was discharged because of protected concerted activity. Dec. 33 at 31-32; Tr. 36-39, 71-72, 118-119, 260-262, 267-280, 349, 431-432, 435-436; Resp. Ex. 2, 8-14, 16-17, 18, 21, 33.

5. The ALJ erred by ignoring undisputed evidence that Shahat told Employer, in conjunction with a July 11, 2016 complaint, that he could not speak for others, thereby precluding a conclusion that he had engaged in “concerted” activity. Dec. 16 at 7-15; Tr. 71-72, 349.

6. The ALJ erred by finding that Shahat had engaged in “concerted” activity rather than finding that Shahat’s activity was personal to him and “mere griping.” Dec. 33 at 32-35; 34 at 2-12; Tr. 118-119; Resp. Ex. 21, 33.

7. The ALJ erred by finding Shahat’s actions were for “mutual aid and protection” and not merely to further his individual interests. Dec. 34 at 14-22; Tr. 116-123; Resp. Ex. 21, 33.

8. The ALJ erred by finding that the decision to discharge Shahat was made at a meeting on July 14, 2016 and not the prior week. Dec. 17 at 9-18 and fn. 20; 32 at 42-46; Tr. 387-390, 457-458, 464.

9. The ALJ erred by ignoring evidence that decisionmakers Deen and Shannon decided to discharge Shahat the week before he made his July 11, 2016 complaint. Dec. 17 at 9-18 and fn. 20; 32 at 42-46; Tr. 387-390, 457-458, 464.

10. The ALJ erred by overlooking evidence that Employer's decision to discharge Shahat was made separate from and at a different time than Employer's decision as to when to end Shahat's employment. Dec. 17 at 4-18; Tr. 389-390, 464-465.

11. The ALJ erred by discrediting Phil Deen's testimony about the dates of decisions to discharge Shahat and when to discharge him. Dec. 17, fn. 20; Tr. 457, 464-465, 483-485.

12. The ALJ erred by discrediting Brian Shannon's testimony about the dates of his decisions to discharge Shahat and when to discharge him. Dec. 17, fn. 20; Tr. 387, 390, 396.

13. The ALJ erred by finding Employer knew of any Shahat protected concerted activity before deciding to discharge him. Dec. 33 at 37-44; 17 at 9-14, fn. 20; Tr. 393, 459, 467.

14. The ALJ erred by giving insufficient weight to evidence of numerous and various Shahat performance issues continuing over a long period and then by concluding (erroneously) that his discharge by Employer was motivated by protected concerted activity. Dec. 34 at 24-34; Tr. 36-39, 260-262, 267-280, 431-432, 444; Resp. Ex. 8-14, 16-17.

15. The ALJ erred by finding that, immediately before his July 11, 2016 complaint, Shahat was not in danger of being fired for poor performance. Dec. 34 at 27-29; Tr. 458, 463-464; Resp. Ex. 8-14, 16-17.

16. The ALJ erred by giving insufficient weight to undisputed evidence of Employer's continuing efforts to improve Shahat's performance and to avoid harming his career and then by concluding (erroneously) that Shahat's discharge by Employer was motivated by his protected concerted activity. Dec. at 34 at 24-34; Tr. 29-31, 280-286, 441-443; Resp. Ex. 9, 18.

17. The ALJ erred by ignoring undisputed evidence that Employer was required to significantly limit or modify Shahat's job duties and assignments because of his refusal or failure to satisfactorily perform the duties required by his position, thereby substantially negatively impacting Shahat's utility/effectiveness. Dec. 3 at 30-34; Tr. 261, 435-436.

18. The ALJ erred by finding that Employer failed to properly investigate Shahat's July 11, 2016 complaint and then by concluding (erroneously) that such failure was evidence of Employer animus. Dec. 22 at 26--23 at 6; 33 at 1-21; Tr. 345-361.

19. The ALJ erred by finding that Employer failed to sufficiently discipline Shahat for performance issues that occurred after Shahat's July 11, 2016 complaint and then by concluding (erroneously) that such failure was evidence of Employer animus. Dec. 23 at 12-22; 33 at 24-29; 35 at 15-19; Tr. 458, 463-464.

20. The ALJ erred by ordering Employer to cease and desist illegal activity and by requiring Employer to implement affirmative actions. Dec. 36-39; Tr. 36-39, 260-262, 267-280, 395, 431-432, 444, 472; Resp. Ex. 2, 8-14, 16-17, 18, 20, 21, 33.

For the foregoing reasons, and as set forth in Employer's Brief in Support of Exceptions filed contemporaneously herewith, Mitsubishi Hitachi Power Systems Americas Inc. respectfully requests that the Board reject the ALJ's findings and conclusions that Employer violated Section 8(a)(1) and dismiss the Complaint.

Respectfully submitted,

/s/William B. deMeza
William B. deMeza, Jr.
Florida Bar No. 332348
bill.demeza@hklaw.com
HOLLAND & KNIGHT, LLP
100 North Tampa Street
Tampa, FL 33602-3644
(813) 227-8500
(813) 229-0134 fax

Counsel for Respondent Employer

CERTIFICATE OF SERVICE

I certify that on March 1, 2018, a copy of this "Respondent Employer's Exceptions to Administrative Law Judge's Decision" was transmitted by email to John Plympton, Esq., Counsel for the General Counsel, National Labor Relations Board Region 12, 201 E. Kennedy Blvd.— Suite 530, Tampa, FL 33602.

/s/William B. deMeza

Attorney